No. 724

Supreme Court of the United States

BRIEF OF RESPONDENTS
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 724

LEE ROY HAZELTON, Administrator of the Estate of Charlotte Hazelton, Deceased,

Appellant and Petitioner,

vs.

THE CITY OF SAN DIEGO, a Municipal corporation, Councilmen of the City of San Diego, and the CITY OF CORONADO, a Municipal corporation, Councilmen of the City of Coronado,

Appellees and Respondents.

To the Honorable Earl Warren, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents and appellees pray that the Petition for Writ of Certiorari to review the decision of the District Court of Appeal of the State of California, Fourth Appellate District, entitled, "LEE ROY HAZELTON, Administrator of the Estate of Charlotte Hazelton, Deceased, Appellant and Petitioner, vs. THE CITY OF SAN DIEGO, a Municipal corporation, Councilmen of the City of San Diego, and the CITY OF CORONADO, a Municipal corporation, Councilmen of the City of Coronado, Appellees and Respondents," be denied.

I
INTRODUCTION

A.
OPINIONS OF THE COURT BELOW

The opinion of the District Court of Appeal of the State of California, Fourth Appellate District, has been set forth in the Petition for the Writ of Certiorari, Appendix "A" page 1a.

B.
STATEMENT OF THE CASE

In order to clarify the facts before the Court and in order to set such facts forth in chronological order, appellees and respondents take this opportunity to present the following:

Pursuant to a written request of thirteen property owners and residents in the South Bay area, the City Council of the City of San Diego, on December 22, 1953, initiated an annexation designated as "San Diego Harbor Tidelands Annexation." This was an annexation under the provisions of the laws of the State of California relating to municipal annexation. No contention has ever been raised in the litigation involving the three annexations by The City of San Diego that the provisions of the California Statutes relating to such annexations were not followed. The area involved in this annexation was waters within the San Diego Bay under no political jurisdiction, but owned by the State of California and administered by the State Lands Commission of the State of California. The State Lands Commission was given proper notice of the pendency of the annexation and

Appellant's Petition, Appendix page 23e). This annexation was completed on September 14, 1954, at which time the ordinance of annexation was filed with the Secretary of State of the State of California. This annexation was contiguous at its northerly end with the then existing southerly boundaries of The City of San Diego across the Bay of San Diego (see Appellant's Petition, Appendix page 22e).

On December 8, 1954, pursuant to a petition from the Western Salt Company, the owner of all of the land involved within the area proposed to be annexed, the City Council commenced an annexation of the area known as "San Diego Western Salt Company Tract" under the provisions of the Uninhabited Annexation Act of the State of California. On April 25, 1955, this annexation was completed by the filing of the annexation ordinance with the Secretary of State of the State of California. The area annexed in this proceeding was contiguous to the San Diego Harbor Tidelands Annexation (see Appellant's Petition, Appendix page 26e).

On or about March 20, 1957, pursuant to a sufficient petition filed with the City Council of The City of San Diego, the City Council commenced the proceedings to annex the area known as "San Diego South Bay Annexation" under the provisions of the inhabited annexation laws of the State of California. No question has ever been raised in any of the lengthy proceedings involving this annexation that the requirements of the inhabited annexation laws of California were not strictly followed. A special election was held on July 16, 1957, and at such election 820 yes votes to 585 no votes were cast in favor of such annexation. Thereafter, the annexation was completed by the filing of the appropriate

ordinance with the Secretary of State on September 13, 1957. The San Diego South Bay Annexation area is contiguous at its north end with the San Diego Western Salt Company Tract Annexation (see Appellant's Petition, Appendix pages 29e et seq.).

Petitioner-appellant was and is a resident within the "South Bay Annexation" area, but was not and is not a resident of either of the areas involved in the two "uninhabited annexations" (see Appellant's Petition, Appendix pages 31e, 32e).

C.
STATUTES INVOLVED

1. California Government Code Section 35303:

"§ 35303. 'Uninhabited territory' defined.

For purposes of this article territory shall be deemed uninhabited if less than twelve registered voters reside within it at the time of the filing of the petition for annexation or the institution of proceedings on motion of the city legislative body."

2. California Government Code Section 35310:

"§ 35310. Initiation of annexation by legislative body; contents of resolution

The legislative body of a city may initiate proceedings to annex the territory on its own motion without requiring a petition. If it does, the resolution giving notice shall declare that proceedings have been initiated by the legislative body and set forth its reasons for desiring annexation."

3. California Government Code Section 35311:

"§ 35311. Publication or posting of resolution of annexation; service of notice on owners of lands; notice to supervisors of annexation of county lands

The city clerk of the annexing city shall cause a copy of the resolution to be published at least twice, but not oftener than once a week, in a newspaper of general circulation published in the city, and also in a newspaper of general circulation published outside of the city but in the county in which is located the territory proposed to be annexed; publication to be complete at least 20 days prior to the date set for the hearing. If there is no newspaper of general circulation published within the annexing city, he shall post a copy of the resolution not less than 20 days before the hearing in at least three conspicuous places within the territory. If proceedings are initiated by petition of the owner or owners of all of the territory to be annexed publication of the resolution outside of the city is not required.

(a) The city clerk of the annexing city shall also cause written notice of such proposed annexation to be mailed to each person to whom land within the territory proposed to be annexed, is assessed in the last equalized county assessment roll available on the date the proceedings were initiated, at the address shown on said assessment roll or as known to said clerk, and to any person who has filed his name and address and the designation of the lands in which he has any interest, either legal or equitable, with said clerk. (Emphasis added.)

(b) In the event any land within the territory proposed to be annexed to a city is owned by a county, the city clerk of the annexing city shall also cause written notice of such proposed

annexation to be mailed to the board of supervisors of such county.

The notice referred to in subsections (a) and (b) shall be given not less than 20 days before the first public hearing on the proposed annexation; provided, that such notice need not be sent if the owner or owners of all of the territory to be annexed have petitioned for annexation or filed their consent to such annexation in writing with the legislative body."

4. California Government Code Section 35312:

"§ 35312. Protests by owner against annexation; contents; 'owner' defined

At any time before the hour set for hearing objections, any owner of property within the territory may file written protest against the annexation. The protest shall state the name of the owner of the property affected and the description and area of the property in general terms. As used in this article, 'owner' means the owner as shown on the last equalized assessment roll, or the person or persons entitled to be shown as owner on the last equalized assessment roll, or where the property affected is subject to a recorded written agreement to buy, the purchaser under such agreement to buy shall be deemed the owner. Protests may be made on behalf of the owner by an agent." (Emphasis added.)

5. California Government Code Section 35313:

"§ 35313. Hearing on protests; limitation on further proceedings; valuation of public property; 'value of territory' defined

At the time set for hearing protests, or to which the hearing may have been continued, the legislative body shall hear and pass upon all protests so made. If protest is made by the

owners of one-half of the value of the territory as shown by the last equalized assessment roll, further proceedings shall not be taken. The value to be given publicly owned property for protest purposes shall be determined by the legislative body. If publicly owned property and privately owned property are proposed to be annexed in the same proceeding, further proceedings shall not be taken if protest is made either by private owners of one-half of the value of the privately owned territory proposed to be annexed, or by public owners of one-half of the publicly owned territory proposed to be annexed. As used in this article, 'value of the territory' means the value of the land and improvements thereon."

6. California Government Code Section 35313.1:

"35313.1 Tide or submerged lands; valuation; application of section

When territory proposed to be annexed consists wholly or partly of tide or submerged lands owned by the State, the legislative body shall determine the value of such tide or submerged lands for the purposes of this article. For the purposes of such determination, the State Lands Commission shall fix the value of tide or submerged lands owned by the State and shall notify in writing the legislative body of its determination. The legislative body may be guided by the valuation as determined by the State Lands Commission, or it may refuse to do so. If the legislative body refuses to accept such valuation, it shall bring an action for declaratory relief, to which the State Lands Commission shall be a party, for a determination of the value of the lands. During the pendency of such action further proceedings for annexation shall be stayed, and the valuation determined by the court shall be conclusive upon the legislative body. (Emphasis added.)

The provisions of this section shall not apply to any proceedings for the annexation of territory commenced prior to June 1, 1957."

7. California Government Code Section 35314:

"§ 35314. Effect of no protest

If such a protest is not made, the legislative body shall forthwith approve or disapprove the annexation, by ordinance."

II

THE QUESTIONS RAISED IN THE PETITION FOR THE WRIT OF CERTIORARI

On page 2 of the Petition is set forth the "Questions Presented." Because the question as worded therein contains conclusions of fact and law, respondents and appellees take this opportunity to restate the "questions" raised by the Petition for Writ of Certiorari. Considering the Petition for Writ of Certiorari from its "four corners" the following questions appear to be the real questions raised by the Petition: FIRST, that appellant was deprived of property without due process because of the failure of the uninhabited annexation law of California to provide for notice to him of the proposed uninhabited annexations, i.e., San Diego Harbor Tidelands Annexation and San Diego Western Salt Company Tract; and, SECOND, that uncertainty has been created as to the validity of the exercise of political jurisdiction and authority by The City of San Diego over the areas so annexed creating possibility of multiplicity of litigation in the future. As a corollary to the two basic positions advanced above by petitioner and appellant, appellant further takes the position that under California annexation law (whether inhabited or uninhabited) California municipal corporations

may not annex across bodies of water.

III
REASONS FOR DENYING THE WRIT

A.
APPELLANT AND PETITIONER, AS A PROPERTY OWNER IN THE SAN DIEGO SOUTH BAY ANNEXATION AREA, WAS NOT DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BY ANY OF THE THREE ANNEXATIONS INVOLVED IN THIS PROCEEDING

First and foremost, it should be noted that petitioner-appellant makes the "bare" statement that he has been deprived of property without due process under the proceedings as they have occurred in this matter. No showing has been made in the Petition for Writ of Certiorari in what respect petitioner's property has been taken without due process, nor under what real action of The City of San Diego such property, if it has been taken, was so taken. The question of the bare allegation of taking of property without due process has been raised before this Court on many other occasions. It was so raised in Consolidated Turnpike Company v. Norfolk & Ocean View Railway Company (1912) 228 U.S. 596, 57 L. Ed. 982. At page 983 of the Lawyers' Edition, the court stated:

> "The bare claim that the judgment operated to take property of the plaintiff in error without compensation is not enough to justify this court in taking jurisdiction unless it also appears from the averments of fact upon which the claim must depend that the question is one real and substantial, and not so utterly without merit as to be frivolous, or a question concluded by previous

decisions of this court. New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; Equitable Life Assur Soc. v. Brown, 187 U.S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123; Deming v. Carlisle Packing Co. 226 U.S. 102, ante, 140, 33 Sup. Ct. Rep. 80. In Equitable Life Assur. Soc. v. Brown, supra, it was said: '"There must be a real, substantive question on which the case may be made to turn;" that is, "a real, and not a merely formal, Federal question, is essential to the jurisdiction of this court."' The writ in that case was dismissed, the court saying: 'That although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit.'

"The unsubstantial character of the Federal question in the present case will appear when we come to examine the facts upon which it depends."

Assuming that petitioner-appellant has been deprived of property, the question is still raised as to whether such deprivation has occurred without due process and whether, even though it has so occurred, petitioner-appellant is entitled to relief against The City of San Diego. Such question has likewise been considered many times by the United States Supreme Court. In Hunter v. Pittsburgh (1907) 207 U.S. 161, 52 L. Ed. 151, the United States Supreme Court considered this question. At page 159 of Lawyers' Edition, it was stated as follows:

". . . Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

The foregoing has been substantially upheld throughout most of the states in the United States. In an annotation in 64 A.L.R. 1335 entitled, "Power to extend boundaries of municipal corporations" the subject is rather extensively covered. More particularly, at page 1358 the problem here involved is discussed at some length. At page 1358 it is stated:

"It has been held that an act extending the boundaries of a municipal corporation is not unconstitutional as depriving the people of the annexed territory of their property without due process of law through the means of illegal taxation. . . "

The questions rasied by petitioner-appellant in this case have been raised many times in California. Most recently in People v. City of Palm Springs (1958) 51 Cal. 2d 38, 331 P. 2d 4, the questions raised by petitioner-appellant were raised and considered by the Supreme Court of the State of California. Following is a list of some of the questions considered by the court and answered therein:

(a) Plaintiff alleges that the Southern Pacific

Company, an owner of land in the territory, was not served with written notice of its opportunity to protest the annexation, and contends that this omission deprived the city council of jurisdiction to annex the territory;

(b) Plaintiff claims that none of the landowners were afforded the kind of notice or right of hearing required by the act;

(c) Plaintiff contends that the annexation is void because it is unreasonable;

(d) Plaintiff claims that the annexation is void as a fraudulent abuse of the authority conferred by statute; and

(e) Plaintiff contends that the annexation will operate to take property without due process of law.

Each of the foregoing questions was specially answered by the court.

As to the question (a) above, the court held, at page 3 that failure to allege that the city failed to mail written notice to all landowners within the area proposed to be annexed was fatally deficient to the statement of a cause of action. Such statement, of course, carries with it the implication that no notice is required to be given to property owners outside the area proposed to be annexed under the provisions of Section 35311 of the California Government

Code which requires only that notice be mailed to the property owners within the area proposed to be annexed.

Considering question (b) above, the court held that the provisions of Section 35312 of the California Government Code are clear and that only written protests may be filed before the hour set for the hearing by "any owner of property within the territory." This holding further bolsters the position that property owners outside the area proposed to be annexed are not entitled to notice under due process requirements.

In answer to question (c) listed above, the court held at page 45 that the topography, size, shape, character or extent of the territory annexed is a political question and that the wisdom or expediency of any particular annexation is not a judicial question.

Question (d) was answered by the court at page 46 upon the basis that there was no violation or evasion of any statutory provision relating to the annexation and that bare allegations to the effect that there is a fraudulent abuse of authority do not establish such abuse.

In answer to question (e), that the annexation will operate to take property without due process of law, the court stated at page 47:

> ". . . There is no merit in this contention. No one has a vested right to be either included or excluded from a local governmental unit (Peart v. Board of Supervisors, 145 Cal. App. 2d 8, 11 (301 P. 2d 874)), and the fixing of territorial boundaries of a municipal corporation will not ordinarily constitute an invasion of

federal constitutional rights. (Hunter v. City of Pittsburgh, 207 U.S. 161, 178-179 (28 S. Ct. 40, 52 L. Ed. 151); Forsyth v. Hammond, 166 U.S. 506, 518 (17 S. Ct. 665, 41 L. Ed. 1095); Kelly v. City of Pittsburgh, 104 U.S. 78, 80-81 (26 L. Ed. 658).)"

One additional statement was made by the California Supreme Court in the Palm Springs case. At page 48 the court, in considering the question of the taxation of property included within an area annexed by an adjacent municipality, used the following language:

"Since the burden which plaintiff anticipates is that of a general ad valorem property tax imposed to support the local government, it is not necessary that any special benefit accrue to the land by reason of the annexation. (City of Santa Rosa v. Coulter, 58 Cal. 537; see also Town of Dixon v. Mayes, 72 Cal. 166, 168 (13 P. 471).) The validity of such a tax does not depend on the receipt of some special benefit as distinguished from the general benefit to the community. (Memphis & Charleston Ry. Co. v. Pace, 282 U.S. 241, 246, 249 (51 S. Ct. 108, 75 L. Ed. 315, 72 A.L.R. 1096); St. Louis & S.W. Ry. Co. v. Nattin, 277 U.S. 157, 159 (48 S. Ct. 438, 72 L. Ed. 830); Morton Salt Co. v. City of South Hutchison, supra, 177 F. 2d 889, 891-892.) '(I)t is constitutionally sufficient if the taxes are uniform and are for public purposes in which the whole city has an interest.' (Morton Salt Co. v. City of South Hutchison, supra, 177 F. 2d 889, 891.) Thus the performance of such ordinary municipal services as police and fire protection within the existing boundaries of the city (see Kelly v. City of Pittsburgh, supra, 104 U.S. 78, 82) together with the prospect that the city, consistent with its own interests and declared intent, will extend those services to the

annexed territory, will justify the imposition of taxes and will be sufficient to satisfy the due process clauses of the state. . . "

B.

THE FEDERAL COURTS, INCLUDING THE UNITED STATES SUPREME COURT, SHOULD BE BOUND BY DETERMINATION OF STATE OFFICIALS, STATE BODIES AND THE STATE COURTS INSOFAR AS INTERPRETATION OF STATE LAWS ARE CONCERNED

The decisions of the state courts should be followed by the Federal courts and by the United States Supreme Court. The fact that the intermediate appellate court of California (the Fourth District Court of Appeal) has been the last court to issue its decision should not induce the Federal courts or the United States Supreme Court to disregard the statements contained in that decision.

In West v. American Telephone & Telegraph Company (1940) 311 U.S. 223, 85 L. Ed. 139, the United States Supreme Court considered the effect of a decision by the intermediate appellate state court which the highest court of the state refused to review. At page 144 of Lawyer's Edition, the court stated:

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. Six Cos. of Cal. v. Joint Highway Dist. No. 267, decided

this day (311 US 180, ante, 114, 61 S Ct 186); Fidelity Union Trust Co. v. Field, No. 32, decided this day (311 US 169, ante, 109, 61 S Ct 176). Cf. Graham v. White-Phillips Co. 296 US 27, 80 L ed 20, 56 S Ct 21, 102 ALR 24; Wichita Royalty Co. v. City Nat. Bank. supra (306 US 107, 83 L ed 517, 59 S Ct 420); Russell v. Todd, 309 US 280, 84 L ed 754, 60 S Ct 527 supra. This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. True, some other court of appeals of Ohio may in some other case arrive at a different conclusion and the Supreme Court of Ohio, notwithstanding its refusal to review the state decision against the petitioner may hold itself free to modify or reject the ruling thus announced. Brewster v. Hill, 128 Ohio St 343, 353, 190 NE 766. Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the West Case, whether that will ever happen remains a matter of conjecture. In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had. . . "

More particularly, the real policy to be followed in order to prevent the "unsettlement of the law" has been stated by the United States Supreme Court in Forsyth v. Hammond, 166 U.S. 506, 41 L. Ed. 1095. The extensive question of review by the Federal courts, after determination by the state courts, was covered in that case but, more particularly, the question of the binding effect of the decision of the state courts was likewise reviewed. At page 1100 of Lawyers' Edition the court stated:

"The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the supreme court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions. . . "

C.

THE CORPORATE EXISTENCE, THE POWERS OF MUNICIPALITIES IN CALIFORNIA AND THE QUESTIONS OF ANNEXATION BY MUNICIPALITIES ARE MATTERS OF LOCAL CONCERN ONLY

The interpretation of annexation laws in California or in any other state for that matter, is one which should be left to the state courts, and the Federal courts should not interfere unless there is a very substantial showing of the necessity for such interference. The United States Supreme Court has considered the question of review of decisions by state officials and state courts on many occasions and has set forth rules on whether and when such review would be proper. In Hunter v. Pittsburgh (1907) 207 U.S. 161, 52 L. Ed. 151, the question of review of decisions of the state court had been considered. At page 159 of Lawyers' Edition, the court stated:

". . . Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature,

and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them, property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take, without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

In Mount Pleasant v. Beckwith (1879) 100 U.S. 514, 25 L. Ed. 699, the United States Supreme Court determined that in the absence of any constitutional restriction, the corporate existence and powers of counties, cities and towns are

subject only to the legislative control of the states.

More particularly, in 1896 the United States Supreme Court considered the question of attacks upon the validity of the organization or creation of municipal corporations under existing state law. In Shapleigh v. San Angelo (1896) 167 U.S. 646, 42 L. Ed. 310, the court stated at page 312:

> ". . . The state, being the creator of municipal corporations, is the proper party to impeach the validity of their creation. If the state acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked."

The California Courts have followed the doctrine stated in the Shapleigh case. In City of Burlingame v. County of San Mateo (1949) 90 Cal. App. 2d 705, 203 P. 2d 807, the court stated at page 711:

> "The wisdom or expediency of the annexation of this territory is not a concern of the courts. We can go no further than to see that the existing laws are complied with. The Supreme Court said in People v. City of Los Angeles, supra, 154 Cal. 220, 228:
>
> 'If it be unwise legislation to grant the power to voters in the respective localities as broadly as it is conferred under the Annexation Act, appeal must be made to the legislature itself. That body has the constitutional power to confer the authority on them to do so and has done it, and whether it was wise or not, the courts cannot inquire into it.'
>
> "Later California cases are cited by respondent but it is needless to discuss them since they decide other questions and do not overrule

People v. City of Los Angeles, supra, 154 Cal. 220. Much time is devoted by counsel to Brown v. City Council of City of Long Beach (Cal. App.) 258 P. 693. A hearing was granted in that case by the Supreme Court and if anything said in that opinion conflicts with People v. City of Los Angeles, supra, 154 Cal. 220, it cannot stand as an authority. Likewise cases from other jurisdictions cannot be considered which conflict in principle with the position taken by the Supreme Court of this state."

"The motives of the city council of Burlingame (5 Cal. Jur. 640) or of Mills Estate, Incorporated (1 Cal. Jur. 336) cannot be inquired into so long as they proceeded according to established law."

In In re Pfahler (1906) 150 Cal. 71, at page 79, the court stated:

". . . It is clearly a question of local policy with each state what shall be its various political subdivisions for purposes of internal government, and what shall be the extent and character of the powers of those subdivisions and the manner of their exercise. The power of a state in such matters is absolute. (See Claiborne v. Brooks, 111 U.S. 400, (4 Sup. Ct. 489); Forsyth v. Hammond, 166 U. S. 506, (17 Sup. Ct. 665).) . . ."

D.

THE EXERCISE OF "POLITICAL JURISDICTION" BY A MUNICIPAL CORPORATION ACROSS NAVIGABLE WATERS IS CONTEMPLATED BY THE LAWS OF THE STATE OF CALIFORNIA

Petitioner-appellant, throughout all of the many briefs and points and authorities which have been filed in the

litigation prior to this application for a Petition for Writ of of Certiorari, confuses the meaning of the word "land" in the contiguity requirements of the annexation laws of the State of California and the use of the word "territory" in the annexation laws of the State of California. Attention should be given to the existence of political jurisdiction extending across substantial areas of navigable waters by municipalities in the State of California.

In the case of the City of San Francisco, political jurisdiction of that municipality extends across a substantial portion of San Francisco Bay to include within that municipality Treasure Island and Yerba Buena Island.

In the case of the Cities of Los Angeles and Long Beach, political jurisdiction extends across navigable waters to include a portion of Terminal Island within each city. In addition, at the time of the establishment of The City of San Diego, the political jurisdiction thereof extended across San Diego Bay to include what is now the City of Coronado.

Presently, the jurisdiction of The City of San Diego extends across the San Diego Bay to include certain portions of North Island upon which is a naval installation. North Island is contiguous to and joined by land with the City of Coronado but is contiguous to The City of San Diego only by the navigable waters of the Bay of San Diego.

In decisions in both the state courts and the Federal courts the word "land" has been interpreted. In Higgins Oil & Fuel Co. v. Snow, 113 F 433, at 438, it was stated:

> "It is elementary that 'land' itself, in legal contemplation, extends from the sky to the

depths. Coke says, 'The term "land" includes, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and it has an indefinite extent upwards as well as downwards, so as to include everything terrestrial under or over it.' Co. Litt. 4a. Blackstone says: 'Land comprehends all things of a permanent and substantial nature, being a word of very extensive signification; also, if a man grants all his "lands," he grants all his mines of metals, and his fossils, his woods, his waters, and his houses, as well as his fields and meadows.' 2Bl. Comm. 16-18. Washburn says: 'Land is always regarded as real property, and, ordinarily, whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that "cujus est solum, ejus est usque ad coelum" in one direction, and "usque ad orcum" in the other.' 1 Washb. Real Prop. 3. Land is the surface of the earth, whatever is attached to it by nature or by the hand of man, and all that is contained within or below it."

The question of whether political jurisdiction could extend across a substantial area of navigable waters was raised in the State of Michigan. In that state the Constitution required that representative districts (counties) be of convenient and contiguous territory. In Houghton County Supervisors v. Blackner, 52 N.W. 951; 92 Mich. 638; 16 L.R.A. 432, at 435, the Court stated:

"Some argument is made that the Legislature was bound under the provisions of section 3, art. 4, declaring that 'each representative district shall consist. .. .of convenient and con-

> tiguous territory,' to unite Keweenaw and Isle Royal counties to the county of Houghton, for the reason that, within the meaning of the Constitution, they were not convenient and contiguous territory to any other county. This clause in the Constitution does not bear the restricted meaning contended for. It does not mean in contact by land. Certainly, so far as the islands are concerned, they may be considered contiguous, although separated by wide reaches of navigable deep waters."

In West Berkeley Land Co. v. Berkeley, 164 Cal. 406, the Court discusses at some length the difference between political jurisdiction and ownership, and discusses the meaning of the words "land" and "lands." That was an action to recover from the City of Berkeley moneys paid under protest for the opening and extension of a street under the Street Opening Act of 1889. After discussing the application of the municipality's power over tidelands, the Court stated at page 408:

> "The legislature has left the act in practically its original form, and we must conclude, in view of both prior and subsequent judicial decisions, that the words "land" and "lands" in that statute were used in the technical sense meaning "territory" and not with the definition for which appellants contend."

In Pan American Products Company v. Texas City (1957) 303 S.W. 2d 780, a substantial portion of the annexed area involved completely submerged tidelands. The annexation was attacked by oil lessees of the state who claimed that the only purpose of the annexation was to obtain revenue. The Court upheld the annexation on the basis that it was

"adjacent" within the meaning of the annexation laws of the State of Texas.

In the Petition for Writ of Certiorari, petitioner-appellant cites as authority for the right to attack the validity of these annexations the case of Ocean Beach Heights, Inc. v. Brown Crummer Inv. Co., 302 U.S. 614, 82 L. Ed. 478. The Ocean Beach Heights case involved a writ of certiorari requesting the United States Supreme Court to review a decree of the United States Circuit Court affirming a decree of the United States District Court in favor of plaintiffs. Plaintiffs were requesting an injunction in a bondholders suit to restrain the owners of land from interfering with the collection of taxes. The land in question had been held in a quo warranto suit in the State Court to have been improperly included in incorporating a town. The Supreme Court held that certiorari would lie. The Ocean Beach Heights case is substantially different from the case presently before the Court. In our case, under the applicable State law and appeal to the Courts, the validity of the annexations was sustained.

More appropriate and more pertinent is the case of Forsyth v. City of Hammond, 166 U.S. 506, 41 L. Ed. 1095. This case involved a writ of certiorari to the Supreme Court. The Court of Appeals for the Seventh Circuit Court for the District of Indiana denied a motion for injunction. The United States District Court had refused to enjoin the collection of taxes by the city against petitioner's property. The petitioner had previously adjudicated the question of the annexation to the Supreme Court of the State of Indiana where the annexation was held to be valid. In this action the United States Supreme Court remanded the case to the Circuit Court with

instructions that the suit be dismissed. At page 1099 of Lawyer's Edition:

> "The decision of the Supreme Court of Indiana was in favor of the validity, that of the Court of Appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the supreme court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the circuit court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the supre.. : court. She voluntarily sought its judgment? Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of res judicata apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the supreme court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of res judicata have been so often announced, and are so universally recognized, that citation of authorities is

scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions.

"All that we mean to decide is that the matter of the territorial boundaries of a municipal corporation is local in its nature, and, as a rule, to be finally and absolutely determined by the authorities of the state.

"The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the supreme court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions.

"In the first place the decision of the supreme court of the state was rendered before the filing of this bill in the circuit court of the United States, and not as in the Burgess Case after the judgment in the circuit court. In the second place the decision was upon a question of a local nature, involving the internal policy of the state, and therefore is such a decision as should be, generally speaking, recognized and followed by the Federal courts. And, thirdly, it was a final adjudication between the same parties, and should have been respected as binding and conclusive upon the principle of res judicata."

Considering both the Ocean Beach Heights case and the Forsyth case, it is readily apparent that the facts of the Forsyth case are more applicable to the present petition. In the Ocean Beach Heights case the annexation upon

attack in the quo warranto proceedings in the state court, was held to be invalid and improper. In the Forsyth case all of the appropriate administrative agencies and the courts of the State of Indiana had determined that the annexation was valid and proper. Under the provisions of the applicable California state law relating to petitioner's attack upon the validity of the three annexations here involved, the Attorney General of the State of California ruled that the annexations were valid. The present petitioner and appellant thereafter filed an original proceeding in the Supreme Court of the State of California entitled, "William F. House, Charlotte Haselton, and the City of Imperial Beach, a municipal corporation, Petitioners, vs. Edmund G. Brown, Attorney General for the State of California, et. al., Defendants." Under the provisions of the Supreme Court Rules, the petition was transferred to the California Fourth District Court of Appeal for hearing thereon. The District Court of Appeal (Case No. 4th Civil 5883) decided in favor of the validity of the annexation. The petition for hearing to the California Supreme Court was denied (see Appellant's Petition, page 4). Thereafter, appellant filed the present case in the San Diego Superior Court. Upon demurrer sustained without leave to amend and appeal therefrom, the California District Court of Appeal denied further relief to petitioner-appellant. The California Supreme Court thereafter denied a petition for hearing (see Appellant's Petition, page 5).

A review of the foregoing facts clearly indicates that the California administrative agency involved (the Attorney General) and all of the California Courts have held that the annexations here involved are valid. This is identical

with the facts in the Forsyth case wherein the state agencies and courts all ruled the annexations valid. Under such circumstances it is obvious that the Ocean Beach Heights case is not applicable to the present case. For the foregoing reasons, Forsyth v. Hammond, 166 U.S. 506, 41 L. Ed. 1095, is the precedent which governs.

E.

APPELLANT AND PETITIONER HAS MADE NO SHOWING OF COMPLIANCE WITH RULE 19 OF THE RULES OF THE UNITED STATES SUPREME COURT

A reading of Rule 19 of the Rules of the United States Supreme Court indicates that the Writ of Certiorari should be granted only in cases involving principles which require settlement because of extreme importance to the public in cases where there is a substantial and embarrassing conflict of opinion and authority between lower courts. Petitioner and appellant has made no attempt to follow the basic doctrines and policies established in Rule 19 and has failed to set forth, other than in a "bare legal assertion" facts or statements sufficient to bring him within the rule. Two cases of recent date which have been denied by the United States Supreme Court cover the principles set forth hereinabove.

The first is N.L.R.B. v. Pittsburgh Steamship Company (1950) 340 U.S. 498, 95 L. Ed. 479. At page 482 of Lawyers' Edition, the court stated:

> ". . . Certiorari is granted only 'in cases involving principles the settlement of which is

of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, 261 US 387, 393, 67 L ed 712, 714; 43 S Ct 422; Revised Rules of the Supreme Court of the United States, Rule 38(5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues."

The second case is Rice V. Sioux City Cemetery (1954) 349 U. S. 70, 99 L. Ed. 897. At page 901 of Lawyers' Edition, the court stated:

". . . 'there are special and important reasons' for granting the writ of certiorari, as required by Supreme Court Rule 19.

"This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. In illustrating the character of reasons which may be deemed 'special and important,' the Rule refers to cases.

"'Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably

not in accord with applicable decisions of this court.'

"A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (Magnum Import Co. v. Coty, 262 US 159, 163, 67 L ed 922, 924, 43 S Ct 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup Ct v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc Am Law Inst 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297, US 288, 341, 80 L ed 688, 707, 56 S Ct 466."

IV

CONCLUSION

From a reading of 31 Opinions of the Attorney General of California 55, cited in the Petition for Writ of Certiorari as Appendix "E" at page 21e, it can be readily seen that the attack upon the validity of the three annexations, either collectively or individually, can serve no substantial public purpose. The San Diego Harbor Tidelands Annexation was commenced at the request of a substantial number of property

owners outside the City interested in having the City annex the San Diego Harbor Tidelands area. The Western Salt Company Tract was annexed upon the petition of the property owner involved therein. The San Diego South Bay Annexation was commenced upon a proper petition being filed with the City of San Diego. These annexations obviously are separate and distinct annexations. No complaint has ever been filed with the City of San Diego by the owners of the land involved in the Western Salt Company Tract Annexation, nor does petitioner-appellant claim or allege that any such complaint has ever been recorded. It appears, therefore, that all parties are in fact satisfied with the validity of the first two annexations. The true position of the petitioner-appellant herein is that he would prefer to have had the area in which he owns property within the San Diego South Bay Annexation annexed by some other political jurisdiction, and have had the governmental services provided by another political jurisdiction. No public purpose can now be served by permitting one individual, who is a member of a substantially minority group opposing the initial annexation, to be permitted to harass respondent City of San Diego and the substantially majority landowners and residents of the South Bay annexation area by continued litigation.

Furthermore, a review of the authorities cited indicates that petitioner-appellant has made no showing which would indicate compliance with the policies and doctrines established in Rule 19 of the Rules of the United States Supreme Court.

It is, therefore, respectfully submitted that this Court should deny the issuance of a Writ of Certiorari to the District

Court of Appeal of the State of California, Fourth Appellate District.

Respectfully submitted,

ALAN M. FIRESTONE
Chief Deputy City Attorney

J. F. DU PAUL
City Attorney
Of Counsel

The Respondent CITY OF CORONADO joins in the foregoing brief.

JOHN R. GOODBODY
City Attorney for The City of Coronado

1124 San Diego Trust and Savings Building
San Diego 1, California

IN THE

Supreme Court of the United States

October Term 1960

No. 724

[illegible] Administrator of the Estate of [illegible] Deceased,

Petitioner and Plaintiff

vs.

[illegible] San Diego, a municipal corporation, [illegible] of the City of San Diego, and the City [illegible] Corporation, a municipal corporation, Councilmen City of Coronado,

Respondents and Defendants

PETITIONER'S CLOSING BRIEF FOR CERTIORARI

[illegible]

[illegible] Broadway

[illegible] Street

Los Angeles 13, California

[illegible]

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IN THE

Supreme Court of the United States

October Term, 1960
No. 724

LEE ROY HAZELTON, Administrator of the Estate of Charlotte Hazelton, Deceased,

Appellant and Petitioner,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, Councilmen of the City of San Diego, and the CITY OF CORONADO, a municipal corporation, Councilmen of the City of Coronado,

Appellees and Respondents.

PETITIONER'S CLOSING BRIEF FOR CERTIORARI.

A. Petitioner Is Not Precluded From Raising a Question of Federal Law and Constitutional Concern Because It Arises Out of Subject Matter of Local State Concern Which Is Governed by State Law.

Petitioner is seeking a writ of certiorari to a State Court as against two State Municipal Corporations for violation of the fundamental charter.

Substantially all of the citations and arguments of said municipal corporations in opposition to certiorari

seek to prove a truism which needs no proof, *i.e.*, that certain matters of local State concern, are governed by State law.

Petitioner's quarrel with Appellees relates to the important federal question of whether a State Court may by finality of judgment, at the pleading stage, without a consideration of an aggrieved parties contentions, base a decision on non-federal grounds which has resulted in the evasion of constitutional issues, and whether the United States Supreme Court may remand to the State Court to permit the petitioner to assert and protect her Constitutional Rights.

Appellee's contention that the petition herein must be dismissed in the name of local practice, does violence to the following rule of law stated in the case of *Staub v. Baxley*, 2 L. Ed. 2d 302, 309, 355 U. S. 313:

> "At the threshold, appellee urges that this appeal be dismissed because, it argues the decision of the Court of Appeals was based upon state procedural grounds and thus upon an adequate nonfederal basis, and we are therefore without jurisdiction to entertain it. Hence, the question is whether that basis was an adequate one in the circumstances of this case. WHETHER A PLEADING SETS UP A SUFFICIENT RIGHT OF ACTION OR DEFENSE, GROUNDED ON THE CONSTITUTION OR A LAW OF THE UNITED STATES, IS NECESSARILY A QUESTION OF FEDERAL LAW; AND WHERE A CASE COMING FROM A STATE COURT PRESENTS THAT QUESTION, THIS COURT MUST DETERMINE FOR ITSELF THE AL-

LEGATIONS DISPLAYING THE RIGHT OR DEFENSE, AND IS NOT CONCLUDED BY THE VIEW TAKEN BY THE STATE COURT." (Caps. ours.)

First Nat. Bank v. Anderson, 269 U. S. 341, 345, 70 L. Ed. 295, and cases cited.

B. Municipal Jurisdiction Is Excluded by Article I, Section 8(17) of the United States Constitution.

In substance, the responsive brief of appellee Municipal Corporation declares that the State has willed, and the State has ordered, which is sufficient to stave off inquiry as to whether said municipal corporation has violated constitutional restrictions. No effort has been made to treat, much less refer, to the topic submitted by petitioner (Pet. Op. Br. pp. 20-28), wherein Petitioner has contended that the proceedings conducted by the City of San Diego were specifically prohibited and unauthorized by Article I, Section 8(17) of the United States Constitution.

Appellee's brief is completely silent upon petitioner's said contention and thereby has admitted that the attempted exercise of state and municipal jurisdiction over an area which by express provisions of the United States Constitution is lodged solely and exclusively in the Federal Congress, and an attempted use of said place for contiguity purposes is void. No attempt has been made to contradict such averment by the appellees in opposition to petition for writ of certiorari. Admittedly then, a Municipal Corporation cannot assert political jurisdiction within an area where exclusive jurisdiction is reserved to the Federal Congress. This

Court has a special responsibility to be particularly mindful of the respective boundaries between state and federal authority.

C. A State by Unequal Protection of the Law and Lack of Due Process Cannot Deprive Petitioner of Access to Ask for an Adjudication on Factual Issues Determinative of Want of Jurisdiction, in Violation of Federal Rights.

Appellee has defended constitutional infringements on the ground that the franchise, corporate existence and the powers of municipalities are exclusively matters of local concern. This petition for certiorari has not been presented to test the franchise of the respondent Municipal Corporation whose corporate existence has been brought to task, but *concerns itself with an ordinance passed by the City Council* on a question of its jurisdiction affecting property and personal liberties.

In the case of *Sharkey v. Butte*, 52 Mont. 10, 155 Pac. 266, the Court said:

> "It may be that, as matter of public policy, a private citizen will not be heard to call in question the City's proceedings for minor irregularities or informalities; but where such proceedings are void ab initio for want of jurisdiction of the subject matter, as here, equity will afford relief to the property owner whose taxes would be increased if his property were included within the cities limits."

In *Stoltman v. Clayton* (1920), 205 Mo. App. 568, 226 S. W. 315, conceding that the corporate existence of a municipality or the validity of its charter is open

to suit only by the State in the nature of *quo warranto* or other direct proceedings, the Court declared that the extension of the boundary lines of a municipal corporation would not be raised to the dignity of an original act of incorporation . . . and the question of whether it is void was the subject of judicial inquiry and that "it was proper for the learned trial Judge to give plaintiff his day in Court. . . ."

In the case of *Harvey Canal Land & Improvement Co. v. Gelbke* (1928), 166 La. 896, 118 So. 75, involving an annexation ordinance already passed by the municipality, it was held that the plaintiffs were entitled to maintain an action to have the question determined whether the ordinance was reasonable.

Still another issue to be determined on the merits by the California State Court in the case at bar, upon remand by the Supreme Court, is the question of whether when the action was instituted there was any material change of position on the part of the municipality, at which point private parties may intervene without *quo warranto*, and whether in fact any material expenditures were made for the benefit of the illegally annexed territory, and whether there had been a *de facto* exercise of authority in the territory prior to suit.

The recognized exception to the general rule that private individuals are without capacity to attack the alteration of municipal limits or bounds, *i.e.*, the view being taken by the petitioner in the case at bar, in her pleadings before the State Court, that the act of municipal boundary alteration is void, are sustained in the following cases:

Attorney General of the State of California

See Opinion, Appendix E p. 21(e) appellants' petition for writ of certiorari herein.

Delphi v. Startzman, 104 Ind. 343, 3 N. E. 937;

Pascagoula v. Krebs, 151 Miss. 676, 118 So. 286;

Barton v. Stuckey, 121 Okla. 226, 248 Pac. 592;

Mo. R. Co. v. Maltsberger, 189 Okla. 363, 116 P. 2d 977;

Waco v. Higginson, 226 S. W. 1084, revd. on other grounds;

Red River v. Grand Forks, 27 N. D. 8, 145 N. W. 726;

Ocean Beach Heights, Inc. v. Brown-Crummer Inv. Co., 58 S. Ct. 385, 302 U. S. 614.

D. A State Municipal Corporation May Not Violate Constitutional Rights by Purposely Doing Indirectly That Which It Cannot Do Directly.

Petitioner's brief in opposition to the Petition for Writ of Certiorari is completely silent upon the allegation that three interdependent annexations were calculatedly manipulated to deprive the aggrieved parties of notice, and instead persist in referring to each piecemeal, by avering that no single annexation of itself deprived petitioner of notice. No issue has been proffered by Appellees brief in opposition to the petition for writ of certiorari that the said annexations constituted one transaction, illegally divided into three proceedings to procure a non-contiguous territory, without an opportunity to make timely objections, in denial of the equal protection of the laws, and denial of due process.

"Engrained in our concept of Due Process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. NOTICE IS REQUIRED BEFORE INTERESTS ARE DISTURBED, BEFORE ASSESSMENTS ARE MADE, BEFORE PENALTIES ARE ASSESSED. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. (Citing cases.)

Lambert v. California, 355 U. S. 225, 2 L. Ed. 2d 228, 231.

E. The Question Raised by Appellee That Political Jurisdiction of a Municipal Corporation May Extend Across Navigable Waters Is Not a Matter of Essential Determination in the Case at Bar.

The brief filed by Appellees has raised an issue on the proposition that California State law permits the annexation by a Municipal Corporation of navigable waters. An entire topic is devoted by Appellee to the proposition that political jurisdiction may extend across reaches of navigable areas. In all of the cases referred to by said respondent Municipal Corporation to substantiate said contention there existed contiguity, in contradistinction to the case at bar wherein contiguity to respondent Municipal Corporation is alleged as nonexistent, either by navigable waters or otherwise. Neither side in the case at bar contends that annexation of non-contiguous territory is anything but void, and a usurpation of jurisdiction. Why then cannot the question or issue of contiguity or lack of contiguity be litigated in the State Court?

The principle of *res adjudicata* which Appellee refers to as applying to Petitioner in the case at bar, as enunciated in the case of *Forsyth v. City of Hammond*, 166 U. S. 506 (Resp. Br. p. 24), wherein the Supreme Court of Indiana held an annexation valid is inapplicable in the case at bar because said case presupposed that a trial upon the merits was held, due process complied with, the equal protection of the laws administered, and no conflict with exclusive congressional legislative jurisdiction was involved. The authority thus cited is clearly inapplicable in this pending matter, wherein a hearing upon the merits is sought and federal contentions and points of law are being raised for judicial inquiry, and for a consideration thereof on the merits by the State Court.

F. The Issues Are of Public Importance.

Despite the obvious violation of the State laws, affirmative requirement of contiguity as a condition precedent to a valid annexation of territory by a Municipal Corporation, and the conceded contention by all parties that without such contiguity, annexation proceedings are void *ab initio*, giving rise to a justiciable controversy, the Respondent Municipal Corporation now contends that the question of federal law and concern, *i.e.*, what notice is necessary which is reasonably calculated to inform parties of proceedings affecting their legally protected interests, is not important because the Petitioner has not been deprived of property, and that there is nothing in the federal constitution which protects the Petitioners from the burdens of local illegal taxation.

This contention of respondents is not settled nor clearly defined as they have expressed in their briefs, and in fact on this very issue the California Supreme

Court rendered a divided opinion in the case of *People v. City of Palm Springs*; 51 Cal. 2d 38, wherein the majority opinion stated, at page 47:

> "*Plaintiff contends that the annexation will operate to take property without due process of law.* No one has a vested right to be either included or excluded from a local government unit, and the fixing of territorial boundaries of a municipal corporation will not ordinarily constitute an invasion of federal constitutional rights. (Hunter v. City of Pittsburg, 207 U. S. 161, 178-179; Forsyth v. Hammond, 166 U. S. 506; Kelly v. City of Pittsburgh, 104 U. S. 78."

Thus the majority opinion of the California Supreme Court has taken the rigid posture that before complaint may be taken of arbitrary unconstitutional conduct it is essential that a vested property right be infringed upon.

However, the minority in said opinion not only referred to the United States Supreme Court cases above cited, but pointed out, that in the case of *Myles Salt Co. v. Iberia etc. Drainage Dist.*, 239 U. S. 478, the United States Supreme Court reversed the sustaining of a demurrer to restrain a tax sale of land which had been included in a drainage district and that the Court therein instead of perusing the vested property rights doctrine of being included or excluded from the drainage district, looked to the illegal and objectionable acts of the political body involved: at page 50 of said minority opinion it is stated as follows:

> "The Supreme Court held this was an act of confiscation and violative of the Fourteenth

> Amendment. At page 481 the Court said the delegation of power to include the land in the district was valid but its use which is 'palpably arbitrary and a plain abuse' is illegal." . . . "I can see no difference between including land arbitrarily in a special district and in a municipality."

It thus appears, that in California at least, this important question should be settled by this Honorable Court.

It must be made clear, that the action is not at the instance of one individual, but is a representative suit wherein by virtual representation hundreds of persons and entities are before the Court. Appellee has pointed out in its brief that 585 persons voted against annexation (p. 3, line 30), and the instant action extends not only to the area of San Diego but in principle is of national concern, and requires uniformity of decision not only for the prevention of multiplicity of actions in relation to the City of San Diego's actions in the area, but with relation to burgeoning expansion of other cities in relation to Federally owned property wherein legislative jurisdiction is retained. It is in the public interest that any conflicts be heard, resolved, and completely and finally determined in one proceeding rather than permitted to remain suspended by state official actions which cannot conclusively dispose of the matter, inasmuch as the final authority rests in the Federal Government under the United States Constitution.

Respectfully submitted,

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